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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

MALCOLM BALDRIGE, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

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REPLY BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

In this reply brief, the petitioners Japan Whaling Association and Japan Fisheries Association respond first to the respondents' counterstatement of the case. Under that first heading, the petitioners (1) correct the respondents' inaccurate

depiction of the state of the populations of the whale species subject to the Murazumi-Baldrige Agreement; (2) explain that, contrary to the respondents' description, the International Whaling Commission's decision to impose a moratorium on commercial whaling was primarily a political rather than a scientific decision; and (3) demonstrate the baselessness of the respondents' attack upon the good faith of the petitioners' government.

Then the Japanese petitioners address opposing legal arguments of the respondents, the House amici, and the federal petitioners. The opposing arguments leave unimpaired the petitioners' position that:

(1) the statutes under consideration call for the exercise by the Secretary of Commerce of judgment as to what conduct "diminishes the effectiveness" of the International Convention for the Regulation of Whaling;

(2) if construed so as to deny the Secretary of Commerce discretion to decide whether to certify a treaty partner and impose severe sanctions, the statutes effect an unconstitutional delegation of governmental power;

(3) the statutes should not in any event be read as applying to nations such as Japan that have lawfully exempted themselves from the restrictions imposed under such a convention; and

(4) a United States court cannot, and at the very least should not in the circumstances of this case, command Executive Branch officials to dishonor an international agreement upon which a friendly nation has relied and in such reliance has irretrievably changed its position.

I. THE RESPONDENTS MISREPRESENT THE FACTS CONCERNING WHALE POPULATIONS, THE WORKINGS OF THE IWC, AND THE ATTITUDE OF THE JAPANESE GOVERNMENT.

1. The respondents exaggerate to the point of distortion the state of the populations of the species of whales that are the subject of the Murazumi-Baldrige Agreement. (Resp. Br. 7-10.) The state of blue whale and right whale populations dealt with so dramatically by the respondents (*id.* 1-3) is quite irrelevant to any issue in this case. No stock of whales that is subject to this Agreement is in danger of depletion.

Under the Agreement, Japan took 400 sperm whales during each of the 1984-85 and 1985-86 coastal seasons (the latter of which has just ended) and is allowed to take no more than 200 during each of the two following seasons. That total of 1200 sperm whales -- 400 still at issue -- compares with a recital by Lyall Watson, an ardent advocate of a whaling moratorium, of "best estimates" of current total populations of 350,000 sperm whales in the southern hemisphere and 175,000 in the northern hemisphere. L. WATSON, WHALES OF THE WORLD 175 (rev. ed. 1985). Japanese petitioners cite Mr. Watson's statistics not because of a belief that they are the best estimate or most accurate calculation of whale populations, but because he is in fact a most zealous proponent of the moratorium. The official Department of Commerce estimate of the 1984-85 sperm whale population, prepared pursuant to the Marine Mammal Protection Act, was 982,000 whales worldwide,

198,000 in the North Pacific Western Division Stock. (Fed. Pet. Br. 43 n.50.)

Clearly Secretary of Commerce Baldrige acted prudently when, after consultation with his scientific experts, including Dr. John V. Byrne, the United States Commissioner to the IWC, he relied upon their judgment and that of the IWC Scientific Committee that a taking even at the rate of 400 whales a year for as long as five years "would have only a small effect on the stock [of sperm whales] in the short term." (Fed. Pet. Br. 4a-6a.) Despite the apocalyptic tone of the respondents' presentation, all that now remains in issue, so far as sperm whales are concerned, is the taking by members of the petitioner Japan Whaling Association of 200 of them in each of the next two years.

The Murazumi-Baldrige Agreement also allows for the taking by Japanese whalers in the 1986 and 1987 coastal seasons of Bryde's whales and minke whales and in the 1985-86 and 1986-87 pelagic seasons of antarctic minke whales within limits acceptable to the United States after consultation with Japan. The United States has found acceptable limits of a total of 1,941 antarctic minke whales for the 1985-86 pelagic season and 317 Bryde's whales and 320 coastal minke whales for the 1986 coastal season. These limits correspond to Japan's traditional share of quotas recommended by the IWC Scientific Committee and accepted as quotas by the IWC itself after the moratorium was adopted but before it went into effect.

In his book, Mr. Watson says that there are at least 200,000 minke whales in the world's oceans and that they "are multiplying rapidly," L. WATSON, *supra* p. 3, at 89; the

Department of Commerce estimates more than 300,000 (Fed. Pet. Br. 43 n.50). As for Bryde's whales, Mr. Watson states that "[t]here are clearly local concentrations in all tropical waters which could add up to a sizable world total," L. WATSON, *supra* p.3, at 94, a total that the Department of Commerce places at 30,200 (Fed. Pet. Br. 43-44 n.50).

The respondents seek to capitalize on the fact that the IWC Scientific Committee did not reach a consensus on potential long-term effects of limited whaling. (Resp. Br. 11 n.23.) The scientific uncertainty arises primarily from methodological differences. It is the kind of uncertainty that is commonly encountered in contemporary governmental decisionmaking. This Court has declared that, when a decision involves issues on the frontiers of science, a reviewing court should be most deferential to the determination made by the expert agency decisionmaker. *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council,* 462 U.S. 87, 103 (1983). Given the substantial populations noted above and the very limited numbers allowed to the Japanese, there is no basis for faulting Secretary Baldrige's decision.

2. While the Secretary's decision was based upon a careful analysis of the best available scientific data, the IWC moratorium and the zero quota for sperm whales, by contrast, were adopted without compliance with three mandatory provisions of Article V-2 of the ICRW. That article requires, *inter alia,* (1) that any amendment to the IWC regulations be "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources," (2) that the

amendment "be based on scientific findings," and (3) that it "take into consideration the interests of the consumers of whale products and the whaling industry." The IWC, whose meetings the federal petitioners tell us "have proven increasingly volatile and politicized as member countries have split into sharply polarized camps" (Fed. Pet. Br. 4), bypassed these requirements in adopting its increasingly stringent quotas and, ultimately, the moratorium.

"Save the Whales" has become an emotional rallying cry worldwide. The politicization of the IWC is a function in part of the consequent growth in its membership; small non-whaling countries such as Antigua/Barbuda, Belize, Mauritius, St. Lucia, St. Vincent, and the Seychelles have ratified the ICRW and became members of the IWC in the last few years. The new members have been vociferous advocates of greater restrictions on whaling. The Seychelles, which sponsored the moratorium resolution adopted by the IWC, has been represented in the IWC by Mr. Watson, who is a British subject; there are other similar examples.

The culminating act was the adoption of the moratorium on commercial whaling. Although the moratorium accords with United States policy, it should be understood that, despite the tenor of the respondents' brief, support of the moratorium is not indispensable to being a civilized person. In fact, there is substantial disagreement in the world community.

In our opening brief we quoted the comment of the observer from the United Nations Food and Agricultural Organization at the IWC meeting in 1982. The observer, Dr. J.A. Gulland, concluded: "Given the differing status of the

various stocks, and the fact that virtually all those species or stocks that are seriously depleted are already receiving complete protection, there seems to be no scientific justification for a global moratorium." (Br. 6 n.3.) Dr. Gulland, currently with the Centre for Environmental Technology, Imperial College, London, is one of the world's leading whale population dynamicists. He was one of the original group of three scientists who, in 1965, compiled the IWC's first comprehensive whale population models. Other scientists, and not just in whaling nations such as Japan, share Dr. Gulland's view that the moratorium lacks scientific justification. *See, e.g.*, K. ALLEN, CONSERVATION AND MANAGEMENT OF WHALES (1980).

Japan, with its long cultural attachment to whaling, sees in the course of IWC actions, which the respondents describe with such enthusiasm, the triumph of non-scientific politicking and moralizing -- a triumph gained at the expense of its people.

3. Japan has nevertheless acceded to the reality of the moratorium. There is no ground for challenging, as respondents do (Resp. Br. 11-12), the good faith of Japan in agreeing to cease commercial whaling effective April 1, 1988. Japan has already honored the Murazumi-Baldrige Agreement by withdrawing its objection to footnote 1 of Table 3 of the IWC Schedule pertaining to sperm whales on December 11, 1984. Japan is also committed to withdraw its objection to the IWC moratorium effective April 1, 1988, if the United States obtains reversal of the court order to dishonor the Agreement. There is no dispute that withdrawal of these objections in the one case is and in the other case would be irrevocable.

The respondents speculate that Japan may circumvent its undertaking to discontinue commercial whaling by persuading the IWC to allow "coastal subsistence whaling" for sperm and Bryde's whales off the coast of Japan. (Resp. Br. 11-12.) This speculation misconceives the nature of subsistence whaling. The IWC places subsistence whaling in a separate category from commercial whaling. Quotas for subsistence whaling by indigenous peoples are established by the IWC based, *inter alia*, on a showing of nutritional need of the peoples involved and to avoid cultural disruption of their life style. The United States has not engaged in commercial whaling since 1972, but aboriginal subsistence whaling by Alaskan Eskimos has been authorized by the IWC; they take 26 bowhead whales per year. Denmark (Greenland) takes 10 fin whales and 110 West Greenland Stock minke whales, and the Soviet Union takes 179 grey whales under subsistence quotas. IWC Schedule ¶ 13(b)(1)(i).

Subsistence whaling is not a loophole or a means of circumventing a restriction or ban on commercial whaling but is a way of preserving the traditional lifestyle and diet of peoples historically dependent on whaling. The possibility that the IWC might in the future authorize small-scale whaling to accommodate Japanese coastal peoples is thus irrelevant to Japan's promised cessation of commercial whaling.

Similarly, the respondents assert that "Japan may well issue itself a permit for 'scientific' whaling" as a means of evading the Agreement. (Resp. Br. 12.) This aspersion on Japan, even to the point of the denigrating quotation marks, is totally unjustified. Article VIII of the ICRW recognizes catch

for purposes of scientific research as a sovereign right of a contracting government and therefore a legitimate activity under the Convention. Japan has long been at the forefront of whale research. It has spent more than 5.7 billion yen (over $20 million) on whale research during the past decade. The Government of Japan and Japan Whaling Association do not intend to conduct commercial whaling under the guise of legitimate scientific research.

The IWC, by unanimous decision of all its members, has directed that a comprehensive assessment of whale stocks be completed in order to reevaluate the moratorium no later than 1990. The Government of Japan and Japan Whaling Association intend to conduct scientific research as part of this comprehensive assessment, in order to prove that the moratorium is not scientifically justified and therefore was passed in contravention of the ICRW. The IWC recently convened a special meeting of its Scientific Committee to establish what research need be carried out under the comprehensive assessment mandated by the moratorium decision. Japan submitted a proposal of how to proceed with the comprehensive assessment, in full cooperation with the IWC's efforts.

Japan simply is not the defiant violator of international norms that the respondents attempt to picture. (Resp. Br. 10, 13.) Japan has acted in strict accord with the ICRW. Respondents may regard as an inconvenient technicality Article V-3 of the ICRW, under which a member has the right to lodge an objection to any IWC regulation and thereby exempt itself from it. But Article V-3 is a part of the Convention, as much as

the provisions enabling the IWC to regulate. Because of having filed objections pursuant to Article V-3, Japan has been free under the law of nations to take the whales it has taken since 1984. Furthermore, the taking accorded with Japan's agreement with the United States, entered into in good faith on both sides and scrupulously adhered to by Japan.

II. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS, READ IN THE LIGHT OF ALL RELEVANT AIDS TO CONSTRUCTION, CONFER UPON THE SECRETARY OF COMMERCE DISCRETION IN DETERMINING WHETHER CONDUCT OF FOREIGN NATIONALS DIMINISHES THE EFFECTIVENESS OF THE ICRW.

The court below said that the language of the Pelly and Packwood-Magnuson Amendments "does not indicate the boundaries of administrative discretion intended by Congress to apply." (Fed. Pet. App. 22a.) It sought and found its guide to the meaning of the critical statutory phrase -- "determines [whether conduct] diminish[es] the effectiveness" -- in the legislative history of the statutes.

The respondents disagree. They profess to find in the statutory phrase the clearest of directions to the Secretary of Commerce to certify for sanctions whenever, and in whatever circumstances, he finds that foreign nationals have exceeded an IWC quota. (Resp. Br. 16.) As both these Japanese petitioners and the federal petitioners have pointed out (Br. 22; Fed. Br. 18), Congress would have chosen different words

had its intention been to issue that sort of peremptory direction to the Secretary of Commerce.

The respondents in fact use a little sleight of hand in making their argument that the plain language of the statutes leaves no room for the exercise by the Secretary of Commerce of his judgment. They glide from the making of the determination whether foreign nationals are diminishing the effectiveness of an international fisheries convention -- which seems on the face of the statutory phrase to require the exercise of judgment -- to the unquestionably mandatory certification, once the determination is made, and to the imposition of the sanction, which is also unquestionably mandatory under Packwood-Magnuson. (Resp. Br. 16-17, 20.)

The respondents, to confirm the plain meaning of the statutes as they perceive it, rely on the same legislative history on which the court of appeals relied. (Resp. Br. 18-31.) Issue is fairly joined on the meaning of the legislative history. These petitioners and the federal petitioners contend that the history is consistent with the natural reading of the statutes as leaving to the informed judgment of the Secretary what conduct of foreign nationals is so inimical to the purposes of the ICRW as to call for certification and sanctions. We invite particular attention in this regard to the statements of the chairman of the cognizant House subcommittee and of President Carter when he signed the Packwood-Magnuson Amendment, quoted at pages 24-25 of our opening brief.

The House amici go out of their way to pick a quarrel where in truth there is none. They find in the petitioners' opening briefs a theory "proffered, if only indirectly," that, "in

parsing the legislative intent of a statute affecting foreign relations, the judiciary should depart from traditional standards of statutory construction and employ an analysis which rejects the use of legislative history as evidence of intent." (House Amici Br. 17, 4.) There is no want of analysis of the legislative history in the petitioners' briefs in this Court or any denial that the history is relevant to the ascertainment of legislative intent.

What the House amici apparently have in mind is Judge Oberdorfer's dissent below. Judge Oberdorfer indicated that, because the statutes in issue relate to foreign affairs, he would not so readily find a ministerial duty, enforceable by mandamus, on the basis of "secondary evidence of congressional intent" as he would if the statutes involved "domestic affairs." (Fed. Pet. App. 53a.) Though not espoused in these terms by either set of petitioners in this Court, Judge Oberdorfer's is a perfectly rational view. It accords with this Court's ruling that deference is owed to the administrative construction when a statute is ambiguous, *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 (1984), and with the principle that deference is particularly appropriate when the statute concerns foreign affairs, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936).

Certainly the Japanese Government should not be expected to look behind the plainly judgmental terms in which Congress casts a statute to learn whether in fact the Cabinet officer with whom its diplomats are dealing has the authority to

make the promises that lead them to make serious and irretrievable concessions.

III. IF CONSTRUED TO IMPOSE ON THE SECRETARY OF COMMERCE A MINISTERIAL DUTY TO ENFORCE DECISIONS OF THE INTERNATIONAL WHALING COMMISSION, THE STATUTES INVALIDLY DELEGATE UNITED STATES GOVERNMENTAL POWER.

The interpretation of the Pelly and Packwood-Magnuson Amendments advanced by the respondents raises a serious question whether Congress has authority under the Constitution to fashion a system in which the Secretaries of Commerce and State become the automatic enforcement arm of the IWC. (Br. 28-32.)

The respondents cite *United States* v. *Sharpnack*, 355 U.S. 286 (1958), in support of their assertion that the delegation argument of the Japanese petitioners is "patently frivolous." In *Sharpnack* this Court upheld the constitutionality of the Assimilative Crimes Act of 1948, whereunder state criminal law is enforced in federal enclaves located within a state. The laws that *Sharpnack* allows to be enforced in the federal enclave are by definition duly enacted by a state legislature subject to the constraints imposed by both the state and federal constitutions.

There are effectively no such constraints on the IWC, which, as we have pointed out, failed to abide by governing provisions of the ICRW in adopting the zero quota and the moratorium. Under the respondents' interpretation of the Pelly

and Packwood-Magnuson Amendments, the Executive Branch would be compelled to enforce without question any regulation the IWC might adopt even though the regulation was made in derogation of provisions of the Convention and in violation of international law.

The respondents also assert that Congress in the Northern Pacific Halibut Act of 1982 incorporated into United States law the provisions of a halibut fisheries agreement between the United States and Canada. There is no analogy between the Halibut Act and the Pelly and Packwood-Magnuson Amendments as the respondents construe them. Section 4 of the Halibut Act, 16 U.S.C. § 773b, empowers the Secretary of State, in his discretion, to accept or reject recommendations made by the commission established under the halibut agreement. A rejected recommendation is not binding on United States nationals.

IV. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS CANNOT PROPERLY BE READ AS APPLYING TO JAPAN, WHICH HAS LAWFULLY EXEMPTED ITSELF FROM ICRW RESTRICTIONS.

It is far from "nonsense" (Resp. Br. 19 n.24) to argue, as the Japanese petitioners do, that the Pelly and Packwood-Magnuson Amendments should not be construed to apply to a nation such as Japan that has lawfully exempted itself from IWC restrictions and therefore commits no international wrong by taking more whales than the IWC restrictions allow.

It is the long-standing rule, established by decisions of this Court, that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook* v. *United States*, 288 U.S. 102, 120 (1933)). Whatever else Congress did in the Pelly Amendment, it did not, when it used the phrase "diminish the effectiveness," clearly express a purpose to modify or abrogate any provision of the convention regulating Atlantic salmon, the whaling convention, or any other fisheries convention.

Nor is it correct to assert, as both the respondents and the federal petitioners do, that the application of sanctions to objecting nations is not so inconsistent with the ICRW as to result in an abrogation or modification. To be sure, as the respondents say, "[n]o provision of the Convention obligates other parties to honor a nation's objection or to withhold economic pressure on that nation to comply with IWC quotas." (Resp. Br. 19 n.24.) No more does any provision of the Convention say that other parties are free to apply economic pressure to an objecting nation. The unmistakable implication of Article V-3 is that any such pressure would be inconsistent with the right of objection on which the United States insisted.

Under the respondents' interpretation of Pelly and Packwood-Magnuson (joined in this respect by the Solicitor General), the United States, which insists on the presence of an objection mechanism in all multilateral treaties to which it is a party, would at the same time be informing the world that it will use economic sanctions to prevent other signatories from

exercising the same right of objection that it demands. The very statement of that kind of position condemns it.

Moreover, the claim that a nation's exercise of a right conferred by a provision of a treaty diminishes the effectiveness of the very treaty of which it is a substantive part is self-contradictory and paralogistic. Any provision of a treaty must be deemed by the signatories to further the objectives of the treaty or, at the very least, to be necessary to achieve agreement on the adoption of the treaty in the first instance. It cannot diminish the effectiveness of the treaty to act pursuant to such a provision. This conclusion cannot be avoided by the use of euphemisms such as the federal petitioners employ when they argue that it is not unlawful to "attach adverse consequences" to the exercise of treaty rights, citing this Court's decision in *Moser* v. *United States*, 341 U.S. 41 (1950). The significant thing is that this Court ultimately refused in *Moser*, on the basis of equitable considerations, to enforce against Moser the "adverse consequences" of his exercise of a right under the treaty. *Id.* at 47.

V. THIS IS NOT AN APPROPRIATE CASE FOR JUDICIAL INTERVENTION.

For several reasons, this is not a case for judicial intervention by way of a mandatory order, whether termed injunction or mandamus, that compels a United States official to act in disregard of his own reasonable construction of a statute that he administers. The Court should not intervene in this case in view of its foreign policy implications, the lack of a

clear non-discretionary duty on the part of the Secretary of Commerce, and the equities that argue so strongly for not forcing the United States to breach its promise to Japan.

First, the case is not justiciable. It falls within at least two of the criteria specified in *Baker* v. *Carr*, 369 U.S. 186 (1962), for a nonjusticiable political question. One criterion is "an unusual need for unquestioning adherence to a political decision already made," and another is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

Here, because Japan has acted upon a decision already made by one of the political branches to give its word not to impose sanctions if concessions were made, there is surely "an unusual need for unquestioning adherence" to that Executive Branch decision. By the same token, the "potentiality of embarrassment" would be realized if the decision below were allowed to stand.

The embarrassment is great. The United States, through the Executive Branch, has pronounced that the limited taking of whales by Japan for a short period would not diminish the effectiveness of the ICRW and therefore would not lead to the imposition by the United States of sanctions against Japan. The Judicial Branch, by its contrary pronouncement that Japan must be deemed to have diminished the effectiveness of the ICRW, would force the Executive Branch to renege on its commitment, even though it has led Japan to take irrevocable steps to terminate commercial whaling. Our argument in this respect is not, as the House amici would have it (House Amici Br. 18.), that all

"Congressional enactments affecting foreign affairs are nonjusticiable." It is that, on its particular facts, considering all the circumstances, this case is not justiciable. We ask for just that "discriminating analysis of the particular question posed" in terms of, *inter alia*, "the possible consequences of judicial action" that the Court spoke of in *Baker* v. *Carr*. *Id.* at 211-12.

As Judge Oberdorfer wrote, even if the case is justiciable, however, "the factors which call justiciability into question . . . heighten the need for forbearance by the courts in the absence of a clear command from Congress." (Fed. Pet. App. 51a). Those same considerations that the Court outlined in *Baker* v. *Carr*, especially "the potentiality of embarrassment" discussed above, call for special caution in the courts' exercise of their equity powers. When the proposed injunction or mandamus would have the kind of impact that the order below would have on the Executive's conduct of the foreign relations of the United States, such caution is not a "nebulous and nonspecific way" of avoiding jurisdiction, as the House amici put it (House Amici Br. 8), but represents a sound principle of equitable discretion.

In addition, there is another consideration suggested by Judge Oberdorfer's dissent. (*See* p. 12, *supra*.) The courts below found a ministerial duty, enforceable by mandamus, in statutory language that imposes no such duty on its face. It cannot fairly be said in these circumstances that the defendant Cabinet officers owe "a clear non-discretionary duty," a prerequisite to a mandatory order, *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984).

Finally, there are the strongest possible equitable considerations that militate against the exercise of any judicial power that there may be. We have detailed these in our opening brief. (Br. 45-49.) The respondents offer no rational response to them. Their argument is that "the ultimate equity is that Congress intended mandatory certification under Packwood-Magnuson and consequent loss of fishing privileges for violation." (Resp. Br. 39.) Even if that were an accurate description of what Congress has done, it would not constitute "the ultimate equity." The ultimate equity is that the United States has given its solemn word to Japan and Japan has acted in reliance on that promise made by the United States. Both governments acted in good faith, their actions premised on a United States Cabinet officer's reasonable understanding of his authority. In that situation, the respondents' simplistic and draconian arguments should be rejected.

CONCLUSION

For reasons stated in the opening briefs of these Japanese petitioners and the federal petitioners and in this reply brief, the judgment below should be reversed.

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